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CITATIONS

Case:	
Allen v. *Bickerstaff*, 200 F. 2d 181	3, 4
Statutes and Regulations:	
Internal Revenue Code of 1939:	
Sec. 154, as added by Sec. 334 of the Revenue Act of 1951, c. 521, 65 Stat. 452 (26 U.S.C. 1952 ed., Sec. 154) and as amended by Sec. 104 of the Technical Changes Act of 1953, c. 512, 67 Stat. 615 (26 U.S.C. 1952 ed., Supp. I, Sec. 154)	4
Sec. 421 (26 U.S.C. 1946 ed., Supp. II, Sec. 421)	2, 3, 4, 1a
Internal Revenue Code of 1954, Sec. 692	4
Treasury Regulations 111, Sec. 29.421-1	2a

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

JOSEPH P. MARCELLE, PETITIONER

v.

ESTATE OF RAYMOND LUPIA, BRUNO LUPIA AND AMELIA LUPIA, EXECUTORS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the petitioner, a former Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (R. 54-59) is reported in 109 F. Supp. 6. The opinion of the Court of Appeals (Appendix B, *infra*, pp. 5a-12a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1954. (Appendix B, *infra*, p. 13a.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Section 421 of the Internal Revenue Code of 1939 provided that "In the case of any individual" who dies while in active service as a member of the armed forces, the income tax "shall not apply with respect to the taxable year in which falls the date of his death". The question presented is whether the statute, in addition to forgiving the income tax liability of the deceased up to the date of his death, also cancels the liability of his estate in respect to income realized by it subsequent to the decedent's death but within the same year.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code of 1939 and of Treasury Regulations 111 are set forth in Appendix A, *infra*, pp. 1a-5a.

STATEMENT

The facts in this case, which are undisputed, are substantially as follows:

Technical Sergeant Raymond B. Lupia, the decedent, died on January 7, 1945, while serving as a member of the armed forces of the United States. During his lifetime, he filed his income tax returns on a calendar year basis. He was a member of a business partnership which filed its income tax re-

turns on the basis of a fiscal year ending June 30. (R. 3-4, 39.)

For the fiscal year ended June 30, 1945, the partnership credited to the deceased the sum of $7,916.61 as his share in the partnership income, and credited a share in the amount of $8,184.05 to his estate, the latter amount being for the period January 7 to June 30, 1945. No tax was paid with respect to the income credited to Lupia. However, the estate filed a timely income tax return for the period January 7 to December 31, 1945, reporting the $8,184.05 partnership income credited to it upon which a tax of $2,039.52 was paid. (R. 4-5, 40.)

On December 11, 1946, the estate (here referred to as the taxpayer) filed a claim for refund of the income tax paid by it for 1945 (R. 5) and on March 13, 1952, instituted this suit for refund (R. 1). The District Court entered an order granting the taxpayer summary judgment in the amount sought, with interest (R. 60-61). The Court of Appeals affirmed. (Appendix B, *infra*, p. 13a.)

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is squarely in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Allen* v. *Bickerstaff*, 200 F. 2d 181, in which the identical question was presented on similar facts. The Fifth Circuit interpreted Section 421 of the Internal Revenue Code of 1939 (Appendix A, *infra*, p. 1a) as relating only to the income tax liability of the individual deceased serviceman and as not extending to his estate, a

separate taxable entity, relief from taxes on income realized by it. The court below, on the other hand, held that the statute was intended to forgive not only taxes owing by the serviceman up to the date of his death but also income taxes of the serviceman's estate during the remainder of the serviceman's normal tax year, though attributable to income realized by the estate subsequent to his death. The court below, noting the conflicting decisions upon the question here presented, stated its disagreement with the Fifth Circuit's *Bickerstaff* decision and expressly declined to follow it.

2. The problem of statutory construction raised in this case is a continuing and recurrent one. Section 421 of the Internal Revenue Code of 1939 expired by its own terms on December 31, 1947. However, that section, which applied to servicemen dying between December 7, 1941, and January 1, 1948, was followed by Section 154 of the Internal Revenue Code of 1939, as added by Section 334 of the Revenue Act of 1951, c. 521, 65 Stat. 452 (26 U.S.C. 1952 ed., Sec. 154), which contained similar provisions applicable to members of the armed forces dying while serving in a combat zone in the period June 24, 1950, to January 1, 1954. The latter section was amended by Section 104 of the Technical Changes Act of 1953, c. 512, 67 Stat. 615 (26 U.S.C. 1952 ed., Supp. I, Sec. 154), to extend the expiration date to January 1, 1955. Substantially identical provisions have been embodied in Section 692 of the Internal Revenue Code of 1954, but without any termination date.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

SEPTEMBER, 1954.